No. 90-970

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

LECHMERE, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND FOR LOCAL UNION 919, UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 90 labor organizations representing approximately 14,000,000 working men and women, and Local Union 919, United Food and Commercial Workers, AFL-CIO, the labor organization directly involved in this case, submit this brief *amici curiae* with the consent of the parties as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

I. The legal standard announced in *Jean Country*, 291 NLRB No. 4 (1988), is a proper exercise of the National Labor Relations Board's authority.

A. Section 8(a)(1) of the National Labor Relations Act makes it unlawful for an employer to "interfere with . . . employees in the exercise of the rights guaranteed in section 7" including the right to organize. This

prohibition reaches any conduct with the "likely effect" of frustrating § 7 rights unless the "business justification for the employer's action" outweighs the interference with the § 7 rights. It is the NLRB's function to strike this balance. Pp. 5-8 *infra*.

B. Whenever an employer exercises its property rights to preclude § 7 activity at the workplace, § 8(a)(1) is implicated. Thus, employers must allow their employees to engage in protected activity on the employer's property in non-working areas during non-working hours. But this Court has held that more weighty employer property interests are involved when non-employee union representatives seek access to the employer's property. And the Court has instructed the NLRB to accommodate that employer concern with the countervailing § 7 concern. Pp. 8-12 *infra*.

C. Initially the Board sought to achieve this accommodation by focusing on the availability of "reasonable alternative means" for the union to communicate its message. But under that test relatively strong property rights were required to yield to relatively weak § 7 rights where alternative means of reaching the audience were lacking. To avoid that anomaly the Board decided to first "weigh the relative strength of each party's claim" and examine "alternative means" only when "the respective claims are relatively equal in strength." But that approach allowed weaker property interests to be overcome by more compelling § 7 interests even where property access was unnecessary to the exercise of the § 7 right. Accordingly, in *Jean Country* the Board announced that it would balance "the degree of impairment of the Section 7 right if access should be denied . . . against the degree of impairment of the private property right if access should be granted." Pp. 12-14 *infra*.

D. The *Jean Country* standard is rational and consistent with the Act. That standard, first of all, accords with the general learning as to the meaning of § 8(a)(1).

And *Jean Country* factors into the balance all the relevant considerations, including the employer's interest in controlling access to its property. Petitioner's claim that the Board must "skew[]" the balance "in favor of private property rights" is inconsistent with the text of the Act, its history, and the decisions of this Court. Pp. 14-16 *infra*.

II. The Board acted rationally in applying *Jean Country* to permit union access to non-working areas of an employer's property that is open to the public generally where the union seeks to organize employees who, upon leaving work, are dispersed within a large metropolitan area.

A. Organizational rights lie at the "very core of the purposes for which the NLRA was enacted." The employees' right to organize includes "full freedom to receive aid, advice and information from others" as "organizational rights are not viable in a vacuum" and the role of the organizer is "essential to the free exercise of organization rights." Pp. 16-18 *infra*.

B. (1) Depriving organizers of access to employer property would severely impair organizing. In a large metropolitan area, advertising through the mass media is simply too expensive to be a viable means of communicating with a relatively small employee group. And in that setting, attempting to identify the employees and contact them individually is labor intensive work which also entails heavy costs. The already-organized who, as a practical matter, must finance organizing, simply cannot afford these costs. Pp. 18-24 *infra*.

(2) The alternatives to worksite communications are, moreover, of limited value. Advertising does no allow for the interaction and the dialogue critical to the organizing process. And individualized communication is of questionable utility because of the difficulty of securing the attention of the "swing" group of employees at their

homes and because this method of approach defeats the organizer's central message as to the possibilities of collective action. Indeed, denying the organizer access to property that is open to the public generally communicates a powerful anti-union message to the employees. Pp. 24-26 *infra*.

(3) This conclusion does not conflict with *Babcock & Wilcox*. That case invites an inquiry into the "reasonableness" of the alternative means of communication, and as Judge Selya recognized below "reasonableness is a concept, not a constant." Furthermore, *Babcock & Wilcox* arose at a very different time and place and the Board functions in part to determine whether what may have been reasonable in small-town America in the mid-1950's is still reasonable in metropolitan America in the 1990's. Pp. 26-27 *infra*.

C. Against the severe impairment of § 7 rights that would result from denying property access in this context is the impairment of employer interests that would result from access. Allowing such access does *not* threaten any management interests of the employer. *Nor* does such access interfere with the employer's ownership, possession, use or enjoyment of his property or diminish the property's value. And allowing access in this context does not infringe the employer's right to control who comes onto his land since what is objectionable to the employer here is not the entry but the content of what the organizer says after entering. Thus, the only employer property interest implicated in this case is the employer's interest in controlling the conduct of an invitee on his property. And permitting access means only that for a relatively brief period of time the employer must allow the organizer to engage in activity which the employer must in any event suffer on his property when carried on by employees. This is far less an intrusion on the employer's interests than exclusion would be on § 7 interests. Pp. 27-30 *infra*.

ARGUMENT

The question presented here is whether the respondent National Labor Relations Board ("NLRB" or "the Board") acted within the limits of its authority in ruling that petitioner Lechmere, Inc. ("Lechmere" or "the Employer") violated § 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(1) ("NLRA" or "the Act").

The Labor Board ruled that Lechmere "interfere[d] with . . . the rights granted [in NLRA] Section 7" in contravention of § 8(a)(1) by denying organizers for Local 919, United Food and Commercial Workers Union ("the Union"), access to the open nonworking areas of the Employer's property for the purpose of communicating with employees regarding the desirability of forming a union.

Petitioner and its supporting *amici curiae* challenge both the legal standard announced by the Board in *Jean Country*, 291 NLRB No. 4 (1988), for resolving issues of this type, as well as the manner in which that standard has been applied by the Board here and in like cases. We address these two issues *seriatim*.

I. THE *JEAN COUNTRY* STANDARD

The NLRA confers upon the Labor Board the "authority to formulate rules to fill the interstices of the broad statutory prohibitions." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 501 (1978). Thus, insofar as petitioner challenges the legal rule applied by the Board the question posed here is whether that rule is "consisten[t] with the Act." *Id.* Consideration of that question necessarily begins with the language of the statute. *Consumer Products Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980).

A. Section 7 of the NLRA provides in pertinent part as follows:

> Employees shall have the right to self-organization, to form, join or assist labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .

This section thus "affirmatively guarantees employees the most basic rights of industrial self-determination." *Emporium Capwell Co. v. Community Org.*, 420 U.S. 50, 61 (1975).

To safeguard these "basic rights," NLRA § 8(a), 29 U.S.C. § 158(a), condemns as unfair labor practices the various types of employer conduct that Congress deemed incompatible with the free exercise of § 7 rights. Sections 8(a)(2)-(a)(5) define with some specificity the type of conduct condemned. Section 8(a)'s first subsection—the one at issue here—does not; in "very broad language," R. Gorman, *Basic Text on Labor Law*, 132 (1976), § 8(a)(1) makes it an unfair labor practice for an employer

> to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7 of this Act.

Over the years, this Court has on numerous occasions considered the application of § 8(a)(1)'s general prohibitions in various contexts in which, as the Court has put it, employees or unions have "engaged in conduct inconsistent with traditional notions of private property rights." *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972). The legal dispute here in large measure consists of tendentious argumentation as to how those decisions *taken in isolation* are to be parsed. But these "property" cases are part and parcel of a broader jurisprudence concerning the sweep of § 8(a)(1)'s language and cannot be understood apart from that jurisprudence. We thus briefly review the salient teachings of the Court's § 8(a)(1) decisions generally before turning to the "property" cases specifically.

First, to begin with the basics, the Court has made explicit what is clear on the face of the statute: *viz.*, that "Section 8(a)(1) . . . [is a] broad, remedial provision[]," *Bill Johnson's Restaurants Inc. v. NLRB*, 461 U.S. 731, 740 (1983), whose "purpose . . . is to establish 'the right of employees to organize for mutual aid' without employer interference," *Labor Board v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). Given its breadth, § 8(a)(1) reaches not only employer conduct motivated by an intent to penalize or discourage § 7 activity, but any conduct which "has the likely effect" of interfering with, restraining or coercing the exercise of § 7 rights. *Bill Johnson's Restaurants*, 461 U.S. at 740.

Second, the Court has made it equally clear that not every employer action that falls within the literal reach of § 8(a)(1) violates that section. "[I]t is only when the interference with section 7 rights outweighs the business justification for the employer's action that section 8(a)(1) is violated." *Textile Workers v. Darlington Co.*, 380 U.S. 263, 268 (1965). As Professor Gorman has summarized the resulting legal rule:

> Thus construed, section 8(a)(1) requires that the Board strike a balance between the interests of the employer—which are not specifically accorded weight in the statute but which Congress surely intended be considered in administering a statute designed to further industrial peace and efficiency—and the interests of employees in a free decision concerning their collective bargaining activities. [R. Gorman, *supra*, at 133.]

Third, and finally, "[b]ecause it is the Board that Congress entrusted the task of 'applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms,'" the "function of striking th[e] balance" required by § 8(a)(1) is "committed primarily to the National Labor Relations Board." *Beth Israel Hospital v. NLRB*, *supra*, 437 U.S. at 500-01. "The judicial role is

narrow: the rule which the Board adopts is judicially reviewable for consistency with the Act and for rationality, but if it satisfies those criteria, the Board's application of the rule, if supported by substantial evidence on the record as a whole, must be enforced." *Id.* at 501.

B. Against this background, we now examine the problems that can arise—and have arisen—where, as here, there is a clash between "traditional notions of private property rights," *Central Hardware Co. v. NLRB*, *supra*, 407 U.S. at 543, and the exercise of § 7 rights.

(1) At the threshold, it is clear that given its broad reach, § 8(a)(1) is implicated whenever an employer exercises its property rights to preclude § 7 activity on the employer's property. As Justice Powell wrote for the Court in *Eastex Inc. v. NLRB*, 437 U.S. 556, 574 (1978), the workplace is

> a particularly appropriate place for [the exercise of § 7 rights] because it 'is the place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees.

Thus, to declare a workplace off-limits for § 7 activity clearly impedes—and in the literal language of the statute "interferes with"—the exercise of § 7 rights.

From the very first the Labor Board has so recognized and, in accord with its general obligation under § 8(a)(1), has sought to reconcile the § 7 interests of employees with the countervailing interests of employers. In its seminal decision in *Peyton Packing Co.*, 49 NLRB 828, 843-44 (1943), the Board held that

> It is . . . not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization . . . in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.

At the same time, in deference to the legitimate interest of employers in regulating "the conduct of employees on company time," the Board ruled that "a rule prohibiting union solicitation during working hours . . . must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose." *Id.* at 843.

In *Republic Aviation Corp. v. Board*, 324 U.S. 793 (1945), a group of employers challenged the balance struck by the Board in *Peyton Packing Co.* as inconsistent with the Act. This Court rejected that challenge and sustained the *Peyton Packing* rule as one embodying a rational "adjustment between the undisputed right of self-organization assured to employees under the [NLRA] and the equally undisputed right of employers to maintain discipline in their establishments." 324 U.S. at 797-98.[1]

(2) In the years following *Republic Aviation*, the Labor Board applied the rules endorsed therein to determine the rights of employees *and* of non-employee union organizers alike to engage in § 7 activity at the workplace. The Board reasoned that

> To differentiate between employees soliciting on behalf of the Union and nonemployee union solicitors would be a differentiation not only without substance but in clear defiance of the rationale given by the Board and the courts for permitting solicitation. [*Seamprufe, Inc.*, 109 NLRB 24, 32 (1954), *enf. denied sub nom. Labor Board v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).]

In *Labor Board v. Babcock & Wilcox Co.*, *supra*, however, the Court in reversing the Board, concluded that there is a "distinction . . . of substance," between cases involving restrictions on what *employees* can do on the

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[1] *See also Beth Israel Hospital v. NLRB*, *supra*; *Eastex Inc. v. NLRB*, *supra*; *NLRB v. Baptist Hospital Inc.*, 442 U.S. 773 (1979).

employer's property, and cases involving restrictions on property access by *non-employee* union organizers. 351 U.S. at 113.

That distinction does *not* rest on any supposition that a property restriction on non-employees is any less an interference with § 7 rights than a property restriction on employees. To the contrary, the Court has recognized that communications between employees and non-employee organizers is "essential to the free exercise of organization rights." *Central Hardware Co. v. NLRB*, *supra*, 407 U.S. at 543. *See also* p. 11, *infra*.[2]

The distinction identified by the *Babcock & Wilcox* Court thus relates entirely to the *other* side of the ordinary § 8(a)(1) equation: *viz.*, to the countervailing employer interest involved. "The difference was that the non-employees in *Babcock & Wilcox* sought to trespass on the employer's property whereas the employees in *Republic Aviation* did not." *Eastex Inc. v. NLRB*, *supra*, 437 U.S. at 571.[3]

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[2] The Chamber of Commerce thus could not be more wrong in imputing to the Court the view that nonemployee organizers play an "ancillary role" and in arguing that "the Board and the First Circuit began with an erroneous premise," Br. at 8-9.

[3] The commentators have sharply criticized the *Babcock & Wilcox* Court's understanding of the common law of property:

> At common law, employees had no right to use the workplace for their own purposes; every day of their working time they were bound by the condition of entry imposed by the employer. An employee had no more right to engage in union activity on private property than a non-employee had to enter the property for the same purposes. Both were potential trespassers.
>
> Both instrusions offend the employer's property interest in the same manner: he is made to suffer the presence of unwanted union activity on his property. It is a purely formal distinction that denies protection to one species of trespassory activity because it is a trespass *ab initio* but privileges the other merely because the trespassing activity occurs a few minutes or hours after the employees are already rightfully on the property. [Note, *Still as Strangers: Nonemployee Union Organizers on Private Commercial Property*, 62 Tex. L. Rev. 111, 164-65 (1983).]

See also Note, *Property Rights and Job Security: Workplace Solicitation by Nonemployee Union Organizers*, 94 Yale L.J. 374, 379-80 (1984) ("The employer is asserting a property right to control not merely access to, but more importantly use of, company property. . . . The artificial invitee-trespasser distinction thus veils the fact that, from the point of view of the employer, all workplace solicitation is trespass"); *Eastex Inc. v. NLRB*, *supra*, 437 U.S. at 581-82 (Rehnquist, J., dissenting) ("both *Babcock* and *Republic Aviation* involved a 'trespass on the employer's property' in that unions sought to override the employer's right to prescribe the conditions of entry to its property. . . . The employer has a property right to decide not only who shall come on his property but also the conditions which must be complied with to remain there.").

Given the *Babcock & Wilcox* Court's view that different and more weighty employer interests are implicated when non-employees seek property access, the Court ruled that a different balance is required:

> This is not a problem of always open or always closed doors for union organization on company property. Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. *Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other.* [351 U.S. at 112; emphasis added.]

The Court reaffirmed this "guiding principle" in *Central Hardware Co. v. NLRB*, *supra*, and again in *Hudgens v. NLRB*, 424 U.S. 507, 521-22 (1976), where the Court added the following:

> Under the Act the task of the Board, subject to review by the courts, is to resolve conflicts between § 7 rights and private property rights, "and to seek a proper accommodation between the two." *Central Hardware Co. v. NLRB*, 407 U.S. [539,] 543 [1972]. What is "a proper accommodation" in any situation may largely depend upon the content and the context of the § 7 rights being asserted.
>
> * * * *

> The *Babcock & Wilcox* opinion established the basic objective under the Act: accommodation of § 7 rights and private property rights "with as little destruction of one as is consistent with the maintenance of the other." The locus of that accommodation . . . may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context. In each generic situation, the primary responsibility for making this accommodation must rest with the Board in the first instance.

(3) Since *Babcock and Wilcox* and *Hudgens*, the Board has endeavored, in a variety of property-access contexts, to strike the "accommodation" mandated by this Court.

Initially, the Board read *Babcock & Wilcox* as requiring an all-but-exclusive reliance on the availability of "reasonable alternative means" for the union to communicate its message. *Compare* 351 U.S. at 111-12. But, over time, the Board came to realize that this narrow focus led to a set of anomalous results. The conceptual problem, as the D.C. Circuit has recently put it, is that

> There is an inverse relationship between the centrality of a section 7 right and the availability of alternative means of exercising the right. As the right a union seeks to advance becomes less central and the union's asserted audience becomes larger (e.g. 'consumers' of a product rather than 'employees' of the producer) and less connected to the core dispute, alternative means of reaching the asserted audience become more scarce. [*Laborers Local 204 v. NLRB*, 904 F.2d 715, 718 (D.C. Cir., 1990).]

Accordingly, in *Fairmont Hotel Co.*, 282 NLRB 139 (1986), the Board formulated a somewhat different approach to the "accommodation" mandated by *Babcock & Wilcox* and *Hudgens*. To minimize the risks that "relatively strong claims of private property rights would be required to yield to relatively weak claims of Section 7 rights" on the ground that there was a "lack of alternative means," 282 NLRB at 147, the Board there ruled that

> in cases such as the instant one, it is the Board's task first to weight the relative strength of each party's claim. If the property owner's claim is a strong one, while the Section 7 right at issue is clearly a less compelling one, the property right will prevail. If the property claim is a tenuous one, and the Section 7 right is clearly more compelling, then the Section 7 right will prevail. Only in those cases where the respective claims are relatively equal in strength will effective alternative means of communication become determinative. [*Id.*]

Again, however, experience proved the *Fairmont Hotel* approach less than entirely satisfactory. That approach permitted weaker property interests to be overcome by "more compelling" § 7 interests *even where "access is totally unnecessary to the exercise of the* [§ 7] *right."* *Jean Country, supra*, slip op. at 6 (emphasis added). Concluding that such a result is inconsistent with its mandate to "permit[] infringements on one right only to the extent necessary to maintain the other," *id.*, the *Jean Country* Board determined that "further clarification of the Board's approach in access cases is necessary," *id.* at 2.

Specifically, *Jean Country* concludes that instead of evaluating only the "relative strength" of the § 7 right at issue, the appropriate focus is on "the degree of impairment of the Section 7 right if access should be denied," *id.* at 9, a focus that necessarily entails a close examination of "the availability of reasonable alternative means . . . in every access case," *id.* at 3. The *Jean Country* Board determined further to examine "the degree of impairment of the private property right if access should be granted." *Id.* at 9. The Board thus formulated the following legal standard:

> [I]n all access cases our essential concern will be the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of

impairment of the private property right if access should be granted. We view the consideration of the availability of reasonably effective alternative means as especially significant in this balancing process. [*Id.*]

C. The foregoing establishes that, as Judge Selya concluded for the court below, the *Jean Country* rule "affords a useful analytic model for resolution of access-to-property cases" and is fully "in tune with the Act." 914 F.2d at 321.[4]

Jean Country is firmly grounded in § 8(a)(1)'s formulative principle: *viz.*, that employer conduct which, in a literal sense, "interferes" with the exercise of § 7 rights is proscribed by § 8(a)(1) if, but only if, the interference "outweighs the business justification." Pp. 5-8 *supra*. At the same time, *Jean Country* factors into the balance the employer interest which the Court stressed in *Babcock & Wilcox* and which the Board had previously discounted: *viz.*, the employer's interest in controlling access to its property. Indeed, by focusing attention on the relative degree of impairment of the competing § 7 and employer interests, *Jean Country* calls for a finely calibrated balancing of the critical variables.

Insofar as petitioner and its supporting *amici curiae* challenge the *Jean Country* rule, they are reduced to advancing the unlikely contention that—*in contrast to all other types of § 8(a)(1) cases*—the Act does not permit the Board to decide property-access cases by balancing the competing § 7 and employer interests. That proposition does not withstand analysis.[5]

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[4] *See also Laborers' Local Union No. 204 v. NLRB*, 904 F.2d 715, 718 (D.C. Cir., 1990) (*Jean Country* "sensibly continues the Act in light of High Court precedent"); *Emery Realty Inc. v. NLRB*, 863 F.2d 1259, 1264 (6th Cir. 1988).

[5] In addition to challenging the *Jean Country* rule on its face, petitioner and its *amici curiae* complain that in applying that rule, the Board too readily finds that the alternatives to workplace communication are ineffective and that the Board does not give sufficient

(1) Petitioner contends that in balancing § 7 rights against property rights, the Board is not free to afford "each right . . . equal weight"; rather, according to Lechmere, "the balance must be skewed in favor of private property rights." Pet. Br. at 20.

Significantly, Lechmere points to nothing in the text of the Act—which, to repeat, in terms prohibits *any and all* "interfere[nces] with . . . the exercise of" § 7 rights—that somehow strikes this balance in the favor of employers. Nor does the Employer cite anything in the Act's evolution or legislative history to support the claim that this statute, which was enacted "to protect and *facilitate* employees' opportunity to organize," *American Hospital Assn. v. NLRB*, —— U.S. ——, 59 L.W. 4331, 4332 (April 23, 1991) (emphasis added), uniformly subordinates federal statutory rights to common law property rights. And, although Lechmere seeks to derive comfort from *Babcock and Wilcox*, Pet. Br. at 20, the rule stated in that case is *entirely neutral*: "Accommodation between the two [§ 7 rights and property rights] must be obtained with as little destruction of one as is consistent with the maintenance of the other." 351 U.S. at 112.

The argument of the Chamber of Commerce, in its *amici curiae* brief, is, on the surface, less bold. The Chamber concedes, Br. at 12 n.15, that "[a]n examination of the nature and strength of the respective rights at issue may at times be necessary." But the Chamber contends that such an examination is appropriate only if it is first determined that "the union lacks alternative means for communicating its message." *Id.* In other words, it is the Chamber's view that where a union has *no* reasonable alternative, access may still be denied based on the "nature and strength of the respective rights," but that where such alternatives exist, the employer is al-

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weight to the employer's property right to restrict the activities of invitees generally. These arguments—which relate not to the rule itself but to the manner of its application—are addressed in Part II of our Argument.

ways free to deny access. Heads the employer wins, tails the employees lose.

This is not "accommodation"; it is simply a warmed-over version of Lechmere's contention that "the balance must be skewed in favor of private property rights." And the Chamber is no more successful than Lechmere in identifying anything in the text of the Act or its background that supports—let alone compels—that result.[6]

II. THE NLRB'S APPLICATION OF *JEAN COUNTRY*

In *Hudgens v. NLRB*, *supra*, the Court, after reaffirming that "the basic objective under the Act [is] accommodation of § 7 rights and private property rights," went on to conclude that the "locus of that accommodation . . . may fall at differing points along the spectrum" in different cases and that "[i]n each generic situation, the primary responsibility for making this accommodation must rest with the Board in the first instance." 424 U.S. at 522.

The instant case is illustrative of one such "generic situation:" *a union seeks access to the non-working areas of an employer's property that is open to the public in an effort to communicate on organization with employees who, upon leaving work, are dispersed within a large metropolitan area.* The Board's decision permitting access in this "generic situation" is a sound—and in all events, a rational—elaboration of the NLRA.[7]

[6] The Chamber's brief suffers from a second, critical flaw: the Chamber assumes throughout that in every case there is an objective, yes or no answer, to the question whether "*reasonable* efforts by the union through other available channels of communication will enable it to reach the [audience] with its message," *Babcock & Wilcox*, 351 U.S. at 112 (emphasis added), or whether, *per contra*, "the inaccessibility of [the audience] makes *ineffective* the *reasonable attempts* by non-employees to communicate with them through the usual channels," *id.* (emphasis added). The Chamber's assumption is simply false. As *Jean Country* recognizes, slip op. at 8, the determination of whether a particular alternative means of communication constitutes a "reasonable alternative" is a question of judgment and of degree which is best resolved through a balancing process.

A. It is very much to the point that the § 7 "right to organize" at issue here—which lies "at the very core of the purpose for which the NLRA was enacted," *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 206 n.42 (1978)—encompasses not only the right of employees to discuss organization among themselves but equally "full freedom to receive aid, advice, and information from others concerning these rights and their full enjoyment," *Weyerhauser Timber Co.*, 31 NLRB 258, 264 (1941).

Organizations—like organisms—do not come to life by spontaneous generation; both grow from seeds that must be nurtured. In the union context, that is the role of the organizer.

Forming a union is an act of self-assertion—of independence—on the part of the employees. Given "the economic dependence of . . . employees on their employer and the insecurity that the employment relationship breeds," *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969), it takes considerable knowledge, and vision as to the possibilities, of collective action for unorganized employees to come together to form a union.

The organizer strives to transmit that knowledge and to engender that vision. "[F]inding general individual unrest," the organizer "seeks to transform it into a collective condition and to channel it into the direction of group action." Karsh, Seidman & Lilenthal, *The Organizer and His Tactics: A Case Study* in J. Barbash (ed.), Unions and Union Leadership 94 (1959).

[7] While the Board has likewise allowed access in some other "generic situations," Lechmere overstates its case in contending that under *Jean Country* "[i]nfringement on property rights has become the rule." Pet. Br. at 35. Lechmere's own citations so prove. *See id.* at 35 n.9; *see also Tecumseh Foodland*, 294 NLRB No. 32, 131 LRRM (BNA) 1365 (May 31, 1989); *Richway*, 294 NLRB No. 49, 131 LRRM (BNA) 1362 (May 31, 1989); *Chugach Alaska Fisheries*, 295 NLRB No. 8, slip op. at 6, 132 LRRM (BNA) 1197 (June 15, 1989).

From the very first, the Labor Board has therefore recognized that

> employees cannot realize the benefits of the right to self-organization guaranteed them by the Act unless there are adequate avenues of communication open to them whereby they may be informed or advised as to the precise nature of their rights under the Act and of the advantages of self-organization and may have opportunities for the interchange of ideas necessary to the exercise of their right of self-organization. [*Le Tourneau Co.*, 54 NLRB 1253, 1260 (1944), *aff'd sub nom. Republic Aviation Corp. v. Board, supra.*]

This Court has concurred; Justice Powell, writing for the Court in *Central Hardware Co. v. NLRB, supra*, explained:

> [O]ganization rights are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others. Early in the history of the administration of the Act the Board recognized the importance of freedom of communication to the free exercise of organization rights. [407 U.S. at 543] [8]

In sum, the ability of union organizers to "provide information" regarding unionization is "essential to the free exercise of organization rights." *Id.*

B. As the Board found in this case, where employees, upon leaving work, disperse in a large metropolitan area, depriving union organizers of the ability to communicate with the employees at the workplace (in non-working areas open to the general public during non-working time) would "severely impair" the ability of the organizers to provide information "essential to the free exercise of organization rights." *Jean Country*, *supra*, slip op. at 9. A review of the possible [illegible] methods of communication shows why this is so.

[8] *See also Thomas v. Collins*, 323 U.S. 516, 534 (1945); *Babcock & Wilcox*, 351 U.S. at 113.

(1) The union organizer, by definition, has a *limited audience* to reach: the employees of a particular employer. In the ordinary case—including this one—moreover, the organizer does *not* know the identity of the individual members of this audience. And upon leaving work the individual employees become lost within a large universe of persons.

In the absence of access to the workplace, the organizer who wishes to reach the employees faces two choices: the organizer either must communicate with the entire area population in order to reach the employee group or the organizer must find some way of identifying and communicating with each of the individual employees. In the real world of affairs, each option is riddled with difficulties.

(a) The first option open to an organizing union, at least in theory, would be to use the mass media to reach the entire area population, including the employee group. But where the organizing effort takes place in a large metropolitan area, this option, by definition, requires the union to incur the costs of communicating with hundreds of thousands of people in order to reach a handful of persons. And the union, like any other advertiser, could not be certain that at any given moment in time the intended audience would notice the advertisement.

To make the mass media work, therefore, the union, like any other advertiser, would need to purchase repeat exposures of its advertisement to have any reasonable chance of reaching the intended audience with its organizing message. Indeed, as a rule of thumb, advertisers believe that to reach an audience an advertisement must run at least five to ten times, and political candidates run their advertisements much more frequently.[9]

[9] *See* Hagstrom & Guskind, *Selling the Candidates*, National Journal 2619, 2626 (Nov. 1, 1986); Ed Anderson, *State News Service* (April 19, 1990); *see also* Zielske, *The Remembering and Forgetting of Advertising*, C. Craig & B. Sternthal (eds), Repetition Effects Over the Years 239 (1986).

The costs of such an advertising campaign in a major media market make it "wildly unreasonable" as Judge Selya aptly put it. 914 F.2d at 324.[10] Even candidates for congressional seats located within large metropolitan areas generally are advised to eschew mass media advertising because their target audience—voters in their district—is too small to justify mass media expenses.[11] *A fortiori*, the audience for an organizing campaign in all but the most extraordinary case is far too small to make advertising a viable alternative method of communication as the Board recognizes. *See Jean Country*, *supra*, slip op. at 7.[12]

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[10] The Hartford metropolitan area, in which the instant case arises, is the twenty-third largest media market in the country (out of 209 markets). One "point" of prime time television in Hartford costs $218. *Media Market Guide* (Summer, 1991). An effective advertisement would require at least 500 points. Hagstrom & Guskind, *supra* n.8. An inch of advertising space in The Hartford Courant costs $168.85. *Media Market Guide*, *supra*.

[11] *See* Schwartzman, Political Campaign Craftsmanship 156, 160 (1984); R. Cohen, *Costly Campaigns: Candidates Learn that Reaching the Voters is Expensive*, National Journal 782 (April 16, 1983).

[12] In this regard, *Jean Country* accords with an unbroken line of NLRB and appellate court decisions. *E.g.*, *S & H Grossinger's Inc.*, 156 NLRB 233, 258 (1963), *enf'd*, 372 F.2d 26 (2d Cir. 1967); *Scott Hudgens Co.*, 230 NLRB 414, 416 (1977); *Holland, Rantos Co.*, 234 NLRB 726, 735-36 (1978), *enf'd*, 583 F.2d 100 (3d Cir. 1978), *G.W. Gladders Towing Co.*, 287 NLRB 186, 194 (1987).

In his dissenting opinion below, Judge Torruella asserted that "the crux" of *Jean Country* is "its balance-tipping dogma to the effect that barring 'exceptional cases,' the use of newspapers, radio and television will not be considered a feasible alternative to direct contact with the employees," and Judge Torruella argued that in so ruling the Board "declares inexistent and impotent 'the usual methods of imparting information' used by the entire advertising and publicity industry. This is a clearly unreasonable and arbitrary conclusion considering that these are the very tools normally used effectively by the political and commercial processes of this country . . ." 914 F.2d at 328.

Contrary to Judge Torruella, *Jean Country* does *not* declare these means of communication to be "inexistent" or "impotent"; *Jean Country* says these methods are not "*feasible alternatives*." Slip op. at 7. And as shown in text, that judgment is not only entirely reasonable but is also in full accord with the practices of political and commercial advertisers.

(b) Absent access to the workplace, the only alternative to mass media open to a union seeking to communicate with the employees of a particular employer would be to attempt to identify those employees and to contact each employee individually. Doing so is all but impossible.

In the usual case, there is no readily available listing of employees and their addresses. Nor in large metropolitan areas is there a main street—or another central meeting place—at which the community at large, including the employees of a particular employer, congregate and can be found. Thus, to communicate individually with each employee the union must first ascertain the employees' names and addresses.

There are several ways this might be attempted where the employer is unwilling to give the union such a list.[13] A union can seek to "infiltrate" the employer's workplace and obtain names and addresses covertly through leaked information. Alternatively, a union can attempt to trace each employee as the employees arrive to or depart from work through, e.g., license plate numbers identified by the Department of Motor Vehicles. In either event, constructing the list of employees is labor intensive and time consuming, and is certain to produce only partial—and only partially correct—information.

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[13] Under current law, employers must provide such a list *after* the NLRB directs a representation election but not before. *See Excelsior Underwear Inc.*, 156 NLRB 1236 (1966).

The Board has long recognized, however, that if the employer elects to provide such a list at an earlier point, that fact carries great weight in determining whether property access is necessary to effectuate § 7 rights. *E.g.*, *Le Tourneau Co.*, *supra*, 54 NLRB at 1261 ("In the absence of a list of names and addresses, it appears that direct contact with the majority of the [employer's] employees away from the plant would be extremely difficult"); *SNCO Barge Lines*, 287 NLRB 169 (1987), *aff'd sub nom.*, *National Maritime Union of America v. NLRB*, 867 F.2d 767 (2d Cir. 1988).

Even if a list of employees—or more precisely, suspected employees—can be constructed, making use of the list is a daunting task. The very reason that the list is needed in the first place—the absence, in large metropolitan areas of a central meeting place—makes individual contacts of the essence.[14] The union can attempt a home visit to each employee on its list, but to do so—especially within a large metropolitan area—would demand a veritable army of organizers to travel from place to place throughout the metropolitan area.[15]

(c) In a world of unlimited resources, the foregoing could perhaps be readily dismissed in assessing the impact on § 7 rights of denying the union organizer access to the employer's property. But that is simply not the world in which we live.

Unorganized employees—who, at least in theory, could be expected to bear the costs of an organizing drive—

[14] Direct mail to the employees is not a satisfactory alternative because of the sizable likelihood that unsolicited mail would not be read by the recipients. Indeed, polling data indicates that only 41.9% of all Americans report that they "open and read" the direct mail they receive. Direct Marketing Association, *1989 Statistical Fact Book* 27. Telephone contact, too, suffers both from the defects discussed in the text and the fact that many recipients of unsolicited calls simply hang up on the caller at the outset as a matter of course.

[15] Lechmere complains, Pet. Br. at 23-31, that the Board failed to make a more particularized inquiry as to the feasibility of identifying employees and contacting them individually on the facts of this case. Even if that were true—and the Board's brief shows that there is substantial evidence in the record to support the Board's determination that those means of communication are not reasonable alternatives in this case—it would be of no legal consequence. The principal point of *Republic Aviation Corp. v. Board, supra*, is that the Board is not required to relitigate such issues in each and every case but rather can adopt presumptions based on its experience in the run of cases. Indeed, the Chamber's brief (at 14-25) convincingly demonstrates that speed and predictability of decision-making is of great importance in this area; those interests would be severely disserved if the Board were required to relitigate issues of this type in each and every case.

clearly do *not* have unlimited resources; indeed, the impetus for organization often is the low wages such employees are paid. Furthermore, organization, if successful, creates a "public good"; *viz.* a good whose benefit flows to all members of a group whether or not the individual member purchases the good. Thus, even if their resources were not limited, it would be unrealistic to expect individual workers to voluntarily make substantial investments of their private resources to support the creation of the organization.[16]

Nor do unions—the alternative and principal source of financing for organizing—have unlimited resources. Union derive their income from dues paid by already-organized workers who are themselves working men and women of modest means. And the dues unions receive must support the entire array of the union's actiivties including, most importantly, adequately representing the already-organized; these are "great responsibilities" which "entail expenditure of much time and money." *Abood v. Detroit Board of Education*, 431 U.S. 209, 221 (1977).

These financial realities are underscored by two simple facts. First, as of 1980, union organizing costs were running at $1,000 for every new member. Voss, *Union Organizing: Costs and Benefits*, 36 Ind. & Lab. Rel. Rev. 576, 583 (1983). That figure has not declined. Second, today only one worker out of six is a union member. And that figure is declining. The conclusion is inescapable. The "effectiveness [of organizing rights] depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others."

[16] *See* Hylton & Hylton, *Rational Decisions and Regulation of Union Entry*, 34 Vill. L. Rev. 145, 154 (1989); Fischel, *Labor Markets and Labor Law Compared with Capital Markets and Corporate Law*, 51 U.Chi. L. Rev. 1061, 1072 (1984); *cf.* Posner, *Some Economics of Labor Law*, 51 U. Chi. L. Rev. 988, 994 (1984). Indeed, it is precisely because unions create "public goods" and open the doors to "free riders" that Congress left unions free to negotiate and enforce collective bargaining agreements requiring all members of the bargaining unit to finance the union's activities. *See, e.g., Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956).

Central Hardware Co. v. NLRB, *supra*, 407 U.S. at 543. The financial ability of the already organized to carry the burden of bringing that message to the unorganized is at the breaking point. To the extent the legal regime adds to those costs, it makes § 7's guarantee of the right to organize an empty promise.

(2) Costs aside, the alternatives to workplace communications do not in the usual case provide the union with a fair opportunity to make the case for organization.

Consider first the mass media. By spending enough advertising dollars, presumably a union could reach an unorganized group and communicate the union's message. But advertising, by definition, does *not* allow for interaction and discussion between the organizer and the unorganized employee. Yet, students of the organizing process have found that it is "crucial" for the organizer to "get[] to know th[e] employee[s] and what they care about" and for the employees to get "first hand" a "sense of the particular union involved in the campaign." Getman, *Union Organizing in the Public Sector*, 53 U. Chi. L. Rev. 45, 59, 71 (1986). As Judge Selya put it for the court below,

> personal contact is an important part of any organizing effort. Whether to opt for a union, or not, is rarely a cut-and-dried proposition; there are pros and cons, the evaluation of which may be better suited to the dynamics of lively discourse than to the static impersonality of more remote approaches. [914 F.2d at 323.]

Individual communications with workers at their homes —assuming that, with enough time and expense, a list of the names and addresses of unorganized employees can be developed—does not suffer from the same defect as advertising. But "[t]he factors that work against effective communication in the employee's home are many and largely unavoidable." Note, *Still as Strangers*, *supra*, 62 Tex. L. Rev. at 159.

In the typical organizing campaign, there is a group of strong union adherents, a group of strong opponents,

and a middle group whose decisions are critical to the outcome of the campaign. *See* Getman, *supra*, 53 U. Chi. L. Rev. at 55-56. This group—like the "swing voters" in a political campaign—is unlikely to be pro-active in approaching the union. J. Getman, J. Goldberg & J. Herman, *Union Representation Elections: Law and Reality* 96 (1976). And especially with respect to this middle group, home visits, and home phone calls, are of questionable utility:

> At the outset, some employees, whether because of fear, prejudice, or conviction, will refuse to talk to the organizer . . . In addition, the value of home visits as a tool for communicating information on self-organization and collective bargaining is diminished to the extent organizers find the employees distracted from the relationships and dissatisfaction of their working lives. At home, employees must attend to their responsibilities as parents, spouses, and consumers and are far removed from the work-related concerns that properly should guide them in matters affecting their organizational life. . . .
>
> In a typical home visit, the employee receives the organizer in his powerless, anarchic solitude. Alone, and away from the situations that define the employment relationship, an employee may unreasonably doubt that collective action is desirable or even possible. He may be intimidated by the presence of a "stranger" organizer, especially if the employee is uneducated or inarticulate. He may think that his privacy has been invaded or that his free time is being wasted . . . [Note, *Still as Strangers*, *supra*, 62 Tex. L. Rev. at 159-60.]

Thus, to deny union organizers access to the workplace (in non-working areas open to the general public)—which, as already noted, is a "particularly appropriate place for the distribution of section 7 material," *Eastex Inc. v. NLRB*, *supra*, 437 U.S. at 574—and to relegate the organizer to alternatives which, by their very nature,

are far less effective means of forwarding the organizing process substantially diminishes the value of the § 7 right.[15]

(3) There is one final consideration that is very much to the point in evaluating the effect that denying workplace access would have on the exercise of § 7 rights. Even if the alternative means of communication were not so costly or of such questionable value, a rule which allowed employers to exclude union organizers from property which is open to the general public *inevitably communicates a powerful, anti-union message to the employees.* In his off-premises communications the organizer can speak eloquently about the law's protection of the right to organize but the employees would know that the law subordinates that right to the employer's rights, thereby turning organizing into a subterranean activity. That silent message would go a long way to defeating the right of self-organization created by § 7.

For all these reasons, a rule denying unions seeking to organize workers whose homes are dispersed throughout a large metropolitan area access to the non-work areas on an employer's property open to the public generally—such as the parking lot at issue here—would "severely impair" the ability of unions to communicate with the unorganized and thus would equally impair the employees' right to organize. The NLRB's recognition that this is so can not possibly be faulted.

(4) Contrary to petitioner and its *amici curiae*, this conclusion is not contrary to *Babcock & Wilcox.*

To begin with, it is *not* true, as Lechmere contends, that "*Babcock & Wilcox* instructed the Board to determine only whether union organizers can 'reach' employees without trespassing." Pet. Br. at 23. What *Babcock & Wilcox* actually says is quite different: "when the inaccessibility of employees makes *ineffective* the *reasonable* attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield." 351 U.S. at 112 (emphasis added).

[15] Contrary to Lechmere's contention, we are not arguing—nor does *Jean Country* suggest—that "property rights [should] be compromised because the employees do not react to the message." Pet. Br. at 23. Whether the employees "react"—*viz.*, whether the union is able to persuade—is irrelevant; what is relevant, is whether the union is relegated to media that can only compromise the union's message.

Thus, *Babcock & Wilcox* invites—indeed requires—an inquiry into the "reasonableness" and the "effectiveness" of the alternative means of communications. And, as Judge Selya recognized below, "reasonableness is a concept, not a constant;" the "rights at issue, and the particular, circumstances, color its definition whenever alternative means are examined." 914 F.2d at 322.

It is, of course, true that in *Babcock & Wilcox* the Court found that there were reasonable alternatives to worksite communications through which the union could effectively communicate its message. But that case is not on all fours with this case. *Babcock & Wilcox* involved very different property (industrial plants which were *not* open to the public), and arose at a very different time (in the mid-1950's when unions were at their zenith), in a very different place (rural communities with populations ranging from 6,000 to 21,000). In that small-town culture of thirty-five years ago, it may well have been possible to identify and communicate with the employees without undue expense, and letters, phone calls, home visits, or conversations on main streets may well have been effective methods of communication.

As *Hudgens v. NLRB, supra*, reminds, however, "The responsibility to adapt the Act to changing patterns of industrial life is entrusted in the Board." 424 U.S. at 523. And the fact that in the *Babcock & Wilcox* context the Court found that "other means" of communication were "readily available," 351 U.S. at 114, does not require that the Board reach the same conclusion in cases arising in the urban environment and culture of the 1990's.

C. On the other side of the equation are the interests of the employer that are implicated when a union organizer is allowed to enter a parking lot open to the public to communicate with employees before the latter's work day begins or after it ends. In contrast to the substantial adverse impact that denying access would have on § 7 rights, allowing such access works only a "temporary and minor" interference with property.

It is a commonplace—but one that should *not* be lost sight of—that allowing the limited access at issue in this context *does not threaten any management interest of the employer*. Ever since *Republic Aviation Corp. v. Board*, *supra*, it has been settled that employers have an "undisputed right . . . to maintain discipline in their establishments," 324 U.S. at 798.

What is at stake from the employer's standpoint, then, is *not* any legitimate business interest—that interest is recognized by the NLRA itself—but the interest in being allowed to exercise his property rights to refuse union organizers access to non-working areas open to the public.

The phrase "property right," of course, refers not to a unitary right but to a "bundle of rights." *E.g.*, *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82 (1980). That being so, when we speak of a *deprivation or impairment* of a property right, we refer not to every action that has some secondary effect on the property but to an action that entails a loss of ownership or possession or a significant restraint on the uses to which the property can be put. *Id.* at 82-85.

Allowing union organizers onto the employer's open property does not work such a deprivation or impairment: the organizer's access does *not* affect the ownership of the property, does *not* interfere with the employer's possession, use or enjoyment of the property, and does *not* diminish the property's value. What the Court said in *PruneYard Shopping Center* is, therefore, very much in point:

> Here the requirement that appellants permit appellees to exercise state-protected rights of the free expression and petition on shopping center property clearly does not amount to an unconstitutional infringement of appellants' property rights under the Taking Clause. There is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center. [447 U.S. at 83-84.]

Of equal importance here, allowing access in this context does *not* implicate the particular property interest that was at stake in *Babcock & Wilcox: the right to control who comes onto an owner's land.* In the class of cases at issue here, in which the property is open to the public (albeit for certain purposes), the union organizer does not commit a trespass by coming on the land. What is objectionable to the employer in this case, as in *Republic Aviation Corp. v. Labor Board*, *supra*, *is not the entry as such but the content of what the organizer says after entering.*

Thus, the only "stick[] in the bundle of property rights," *PruneYard Shopping Center*, 447 U.S. at 82, that would be adversely affected by permitting the organizer access to discuss organizing would be the employer's right to control an invitee's conduct. And, as *Central Hardware Co. v. NLRB*, *supra*, recognizes, the impairment of that property interest would be "both temporary and minimal." 407 U.S. at 545. Indeed, the only injury to this property interest in this context is that the employer must allow the organizer, once on the property, to engage in a kind of activity which under *Republic Aviation*, the employer must in any event allow on his property.[18]

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[18] And under the Board's rulings employers can ordinarily avoid even that intrusion merely by affording the union a listing of the employer's employees. *See* n.13, p. 21, *supra*.

By any measure, where the organizing union's alternatives for reaching the employees are not reasonable, this is far less an intrusion on the employer's property interests than exclusion would be on the statutory § 7 interests.

D. It bears repeating once more that the "central purpose" of the NLRA is "to protect *and facilitate* employees' opportunity to organize unions." *American Hospital Assn. v. NLRB*, *supra*, 59 L.W. at 4332. (emphasis added). It would be anomalous indeed if a statute enacted for those purposes put so large a burden on the right to organize in order to avoid such a "temporary and minimal" infringement of an element of the employer's bundle of property rights.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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